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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 756

DON McCULLAGH, INC., a Michigan corporation,
Appellant,

vs

STATE OF MICHIGAN, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the
State of Michigan

MOTION TO DISMISS

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SPEAKER-HINES AND THOMAS, INC., LANSING, MICH.—1959

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On Appeal from the Supreme Court of the
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MOTION TO DISMISS[1]

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal of appellant from the judgment of the Supreme Court of Michigan, entered December 2, 1958, be dismissed on the grounds that (1) the question presented is so unsubstantial as to not warrant argument and (2) the appellant is not the proper party to raise any federal question.

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[1]
Numbers in parentheses will refer to pages of the Jurisdictional Statement, unless otherwise indicated.

OPINIONS BELOW

Citations to the opinions below are correctly set forth in the Jurisdictional Statement (1-2).

JURISDICTION

Appellant attempts to invoke jurisdiction of this Court under 28 U.S.C.A. § 1257(2). For the reasons set forth herein, the appeal should be dismissed.

STATUTES INVOLVED

Applicable provisions of the Michigan sales tax statute[2] and the Michigan use tax statute[3] involved in this appeal are summarized below for convenience:

Section 2[4] of the Michigan sales tax statute, as amended by Act No. 272 of the Michigan Public Acts of 1949, imposes a tax of three per cent on the gross proceeds derived from all persons engaged in the making of sales at retail in the state of Michigan, as defined in other parts of the statute.

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[2]
Act No. 167, PA 1933, as amended by Act No. 204, PA 1953, effective June 10, 1953 [CL '48 §§ 205.51 et seq.; Henderson's Stat Ann §§ 7.521 et seq.].

[3]
Act No. 94, PA 1937, as amended by Act No. 203, PA 1953, effective June 10, 1953 [CL '48 §§ 205.91 et seq.; Stat Ann §§ 7.555 et seq.].

[4]
Mason's '54 Supp § 205.52; State Ann § 7.522.

Section 1(b)[5] of the statute, as amended by Act No. 204 of the Michigan Public Acts of 1953, includes within the definition of "sale at retail"

> "• • • any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any other purpose than for resale, *or for lease when the rental receipts are taxable under Act No. 94 of the Public Acts of 1937, as amended,* • • •." (Italicized portion added by Public Acts of Michigan 1953, No. 204, effective June 10, 1953.)

Act No. 94 of the Michigan Public Acts of 1937, as amended, referred to in the above quotation from § 1(b), imposes a Michigan use tax equal to three per cent of the price paid for the use of property in Michigan.

"Price" is defined in § 2(f)[6] of the use tax statute, as amended by Act No. 203 of the Michigan Public Acts of 1953, to mean

> "• • • the aggregate value in money • • • paid or delivered by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property shall have been purchased *or rented* for storage, use or other consumption in this state • • •. *It is hereby provided*

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[5]

Mason's '54 Supp § 205.51.

[6]

Mason's '54 Supp § 205.92; Stat Ann '57 Supp § 7.555(2).

that no tax is to be computed on rental receipts when the tangible personal property is rented or leased for a period that is less than 7 consecutive days, and in such instance, the lessor shall be deemed to be the consumer of the tangible personal property so rented." (Italicized portion added by Public Acts of Michigan 1953, No. 203, effective June 10, 1953.)

These above-referred-to provisions of the sales and use tax statutes are set forth verbatim on pp 4 and 5 of the Jurisdictional Statement.

Both the sales and use tax statutes provide for various deductions and/or exclusions. Subsections (a), (b), and (e) of § 4[7] of the use tax act, as amended by Act 203, PA 1953 [not reproduced in the Jurisdictional Statement and for that reason set forth here verbatim], exempt:

"(a) Property sold in this state on which transaction a tax has been paid under the provisions of Act No. 167 of the Public Acts of 1933, as amended, being sections 205.51 to 205.78, inclusive, of the Compiled Laws of 1948: *Provided, Such tax was due and paid on the retail sale to the consumer as consumer is defined in this act.*

"(b) Property, the storage, use, or other consumption of which, this state is prohibited from taxing under the constitution, or laws of the United States, or under the constitution of this state.

• • •

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[7] Mason's '54 Supp § 205.94; Stat Ann '57 Supp § 7.555(4).

"(e) Property the sale or use of which has already been subjected to a sales tax or use tax equal to or in excess of that imposed by this act under the law of any other state of the United States: Provided, That if the sale or use of property has already been subjected to a tax under the law of any other state in an amount less than the tax imposed by this act, the provisions of this act shall apply, but at a rate measured by the difference only between the rate herein provided and the rate by which the previous tax was computed: *Provided, Such tax was due and paid on the retail sale to the consumer as consumer is defined in this act: Provided further, That the state in which the tax was imposed accords like or complete exemption on property the sale or use of which was subjected to the Michigan sales or use tax.*" (Italicized portions added by Public Acts of Michigan 1953, No. 203, effective June 10, 1953.)

Section 1(b) of the sales tax act prior to Act No. 204, of the Michigan Public Acts of 1953, did not contain the phrase "or for lease when the rental receipts are taxable under Act No. 94 of the Public Acts of 1937, as amended, * * *." This change in the sales tax act and the italicized changes in the use tax act were effective on the same day.

The simultaneous changes in § 1(b) of the sales tax statute and § 2(f) of the use tax statute subject gross receipts from the rental or lease of tangible personal property to use tax, if rented or leased for a consecutive period in excess of six days. To prevent the gross receipts paid in acquiring such property for such leasing purposes from being subject also to the sales tax, § 1(b) of the sales tax act was amended by Act No. 204 of the Michigan Public Acts of 1951, to exclude from the definition of a "taxable sale at retail" the sale of property which is

rented in such a manner that the rental receipts are subject to the use tax. In this manner, the statutory changes complement and supplement each other.

In order to carry out in the same manner the supplementary and complementary features of both the sales and use tax statutes and to prevent imposing a multiple burden on either domestic or foreign sales or use transactions, the use tax has always exempted, either directly or on a reciprocal basis, property which has been subjected to a foreign sales or use tax. Section 4(e) of the use tax statute, quoted above, provides for this exemption. Section 4(a) of the use tax statute, quoted above, provides a comparable exemption of property sold in this state.

Applicable provisions of the sales and use tax law of the state of Florida provide as follows [Florida Statutes Annotated, Title XIII, Chap. 212, § 212.06, ¶¶ (7) and (8)]:

> "(7) The provisions of this chapter shall not apply in respect to the use or consumption, or distribution, or storage of tangible personal property for use or consumption in this State upon which a like tax equal to or greater than the amount imposed by this chapter has been paid in another State, the proof of payment of such tax to be according to rules and regulations made by the Comptroller. If the amount of tax paid in another State is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the Comptroller an amount sufficient to make the tax paid in the other State and in this State equal to the amount imposed by this chapter.
>
> "(8) It is further specifically provided that the 'use tax' shall not apply to tangible personal property

> owned or acquired in this State, or imported into this State or held or stored in this State prior to November 1, 1949. But, the 'use tax' will apply to all tangible personal property imported or caused to be imported into this State on or after November 1, 1949, unless it appears that said property has previously borne a sales or use tax in another State equal to or greater than the tax imposed by this chapter."

In the instant case, the operative effect of § 4(e) of the use tax statute would be to exempt from the Michigan use tax, property or transactions which had been subjected to either the Florida sales or use tax.[8]

The Supreme Court of Michigan, in rendering its opinion below, has construed the Michigan sales and use tax statutes as being supplementary and complementary revenue measures to the end that property used and consumed within the state of Michigan would be subject to tax under either the sales tax, on retail acquisition, or the use tax, on subsequent use.

Banner Laundering Co. v. *State Board*, 297 Mich 419, 431

Western Electric Co. v. *Department of Revenue*, 312 Mich 582, 596

Kress v. *Department of Revenue*, 322 Mich 590, 593

McCullagh, Inc. v. *Revenue Dept.*, 354 Mich 413

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[8]

Florida Statutes Annotated, Title XIII, Chapter 212, § 212.06 [Florida's sales and use tax statute contains the same rate as the Michigan statutes and exempts property already subject to a sales or use tax of another state (subject to adjustment of differential in rates).]

This Court has so construed similar statutes.

Henneford v. *Silas Mason Co.*, 300 US 577, 583-584

Southern Pacific Co. v. *Gallagher*, 306 US 167, 172

General Trading Co. v. *State Tax Commission*, 322 US 335, 336-337

Nelson v. *Sears and Roebuck*, 312 US 359

This has consistently been the general interpretation of sales and use tax measures of the various states.

Hartman, "State Taxation of Interstate Commerce," Chap. VII, pp 163-172

53 Harvard Law Review 909 (1940) — "New Light on Gross Receipts Taxes", by Thomas Reed Powell

Law and Contemporary Problems, "Consumption Taxes," School of Law, Duke University, Vol. VIII (1941) pp 495-504, "The Future of Use Taxes," by Robert C. Brown

QUESTIONS PRESENTED

If any federal question has been properly raised and presented, the Jurisdictional Statement does not accurately state such question. If appellant is the proper party to raise a federal question, appellee believes the only possible federal question is as follows:

Does the Michigan sales tax act unconstitutionally discriminate against persons engaged in interstate commerce to the extent it defines "sales at retail" to include sales for consumption or use or for any other purpose than for resale or for lease when the rental receipts are taxable under the Michigan use tax act?

In addition, the appellee, by its motion to dismiss, raises the following issues:

1. Is a Michigan retailer (such as appellant) in a position to urge the unconstitutionality of § 1(b) of the Michigan sales tax statute on the grounds that it discriminates against those persons engaged in interstate commerce, as compared to those engaged in intrastate commerce?

2. Has a substantial federal question been presented?

STATEMENT OF THE CASE

Appellee does not accept appellant's statement of the case but believes it to be more accurately stated, in material part, as follows:

The Facts

Both Courts below recited substantially the same stipulated facts. The facts quoted from the Wayne County Circuit Court opinion on pp 7 and 8 and the first paragraph on p 9 of the Jurisdictional Statement are correct and are set forth in the opinion of the Supreme Court below (1a-3a; 354 Mich 413, 415-416). These facts are as follows:

Appellant is a Michigan corporation, selling automobiles in this state. It sold automobiles outright to another Michigan corporation which acquired them for purposes of leasing in the state of Florida. Sales tax due from the appellant to the state of Michigan, resulting from the sale of those automobiles, amounted to $7,694.97.[9] If the

[9] Interest of $860.78 increases the total in controversy to $8,555.75.

automobiles had been leased for use in Michigan under the same terms as the Florida lease, the rental receipts for a *year* would have resulted in a Michigan use tax of $3,065.67. The lease was renewable and there is no evidence in the record to show what the *total* rental receipts were from the use of the automobiles. Thus, the total amount of use tax payable, if there had been a Michigan, rather than a Florida, use is not known.

The Court below stated the case before it to involve the following:

> "The basic question involved in the case is whether the provision of the sales tax act of Michigan, above quoted, discriminates in the obnoxious sense of the term against interstate commerce. As noted, plaintiff's claim in this respect is based on the exemption from the payment of the tax if the sale is made for leasing and use in Michigan so that the rental receipts are taxable under the use tax act. Concededly a State may not impose a tax on interstate commerce, nor may it enforce legislation resulting in unjust discrimination. In determining whether such discrimination obtains by virtue of the legislative enactment here in question consideration may properly be given to the fact that the sales tax act and the use tax act are closely related, to such an extent that each may be said to be complementary to the other. Each is designed to raise revenue from taxation of the privilege of engaging in certain business transactions. That the legislature in the enactment of said statutes, and subsequent amendments thereto, had in mind the practical situation presented is obvious. The provision of the sales tax act here involved is an expression of such recognition, indicating that the general policy of the State was not to impose a double burden on the

bases of the taxes provided for by said acts. (4a-5a; 354 Mich 413, at p 418)

• • •

"In the case at bar it is apparent that the legislature in the enactment of the sales tax act and use tax act, and numerous amendments thereto, has sought to avoid the burden of both taxes being imposed on the same business transaction. The exemptions in each of said statutes clearly indicate such purpose. • • •" (10a; 354 Mich 413, at p 424)

"• • • The sales tax act and the use tax act are complementary. Their relation is such as to require recognition in each of the provisions and operation of the other. As before suggested, the Michigan legislature has acted accordingly in the attempt to work out a fair and just system. • • •" (11a; 354 Mich 413, at p 425)

It found that the Michigan sales and use tax statutes, being related and complementary revenue measures, did not discriminate against interstate commerce. The Court then concluded, on authority of cases such as

Gregg Dyeing Co. v. *Query*, 286 US 472 (quoted on pp 9a-10a; 354 Mich 413, at pp 423-424),

Henneford v. *Silas Mason Co., supra*, 300 US 577,

Southern Pacific Co. v. *Gallagher, supra*, 306 US 167, and

General Trading Co. v. *State Tax Commission, supra*, 322 US 335,

that the definition of "sale at retail" as contained in § 1(b) of the Michigan sales tax act was constitutional.

The appellee, in the Court below, urged that the appellant was not the proper party to raise any question about interstate commerce because it was not engaged in interstate commerce and, as a Michigan retailer, it could not be discriminated against. The lower Court determined that appellant had the right to challenge the validity of the statutory provision in question because the legal incidence of the sales tax fell on it as a retailer of personal property. *The lower Court did not find or determine that the appellant was entitled to raise any federal question as a person engaged in interstate commerce.*

REASONS FOR GRANTING THE MOTION TO DISMISS

1. The appellant is not in a position to raise a federal question on the ground that Section 1(b) of the Michigan sales tax violates the U. S. Constitution by discriminating against persons engaged in interstate commerce in favor of those persons engaged in intrastate commerce despite the ruling of the lower Court that said appellant was a proper party to raise the question of the construction or constitutionality of the Michigan sales tax because the legal incidence of the tax was imposed upon it.

The appellant in this cause is a Michigan retailer. It has sold tangible personal property at retail within this state. The Michigan sales tax statute requires that it pay a tax for this privilege equal to three per cent of the gross proceeds it derives therefrom, less certain exemptions, exclusions and deductions.

If the appellant has any right to be heard, it must be related to the question of whether or not it is entitled to exclude from taxable gross proceeds for sales tax purposes the proceeds received from sales of the automobiles in question. This principle is effectively stated by the court in the *Henneford* case, *supra*, 300 US 577, at p 583:

> "• • • The plaintiffs are not the champions of any rights except their own."

Or, as stated in *Duckworth* v. *Arkansas*, 314 US 390, 397, 398, in the concurring opinion of Justice Jackson:

> "• • • One who assails the constitutionality of a statute must stand on his own right to relief. • • •"

Certainly the appellant, as a retailer in this state, cannot claim that it is being discriminated against when all Michigan retailers are subjected in precisely the same manner to the sales tax statute. Appellant carries on all its activities in question in this state. It is a creature of Michigan law.

It therefore follows that the appellant has no standing to assert that the sales tax act in question discriminates against persons engaged in interstate commerce by unduly burdening that commerce.

2. A substantial federal question has not been presented.

The appellant urges that there is a substantial federal question involved (12-18). In such argument, it ignores the effect of decisions of this Court such as

Gregg Dyeing Co. v. *Query*, *supra*, 286 US 472, and

Henneford v. *Silas Mason Co.*, *supra*, 300 US 577,

as buttressed by a long line of decisions, including

> *Allied Stores of Ohio, Inc.*, v. *Stanley J. Bowers, Tax Commissioner of Ohio*, United States Supreme Court, decided February 24, 1959 (27 LW 4110),

concerning the question of discrimination as related to a state's power to tax.[10] Appellant also ignores the complementary and supplementary nature of the Michigan sales and use tax statutes by arguing against the constitutionality of § 1(b) of the Michigan sales tax statute while, at the same time, in asserting its "multiple burden" or "discriminatory" argument, it assumes that they are identical revenue measures.

Appellant completely misrepresents the effect of its argument. The practical effect of its argument, under the circumstances of this case, as found by the Court below, would be to free the Michigan sales transactions, as well as the subsequent Florida use, from both the Michigan sales tax and the Florida use tax. Appellant asks this Court to

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[10]

See Also *Railway Express Agency v. Commonwealth of Virginia*, 27 LW 4136-4137 where Mr. Justice Clark wrote: "We believe that Virginia has eliminated the Commerce Clause objections sustained against its former tax law. While the tax is in lieu of other property taxes which Virginia can legally assess and should be their just equivalent in amount, *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 696 (1895), we will not inquire into the exactitudes of the formula where appellant has not shown it to be so baseless as to violate due process. *Nashville, C. & St. L.R. v. Browning*, 310 U.S. 362 (1940). The failure of the appellant to furnish, in its return, certain necessary information showing its gross receipts allocated to Virginia, called for under the statute and requested by the Commonwealth, has left the correct amount unobtainable by the latter except by some method of approximation and places the burden on appellant to come forward with affirmative evidence of extraterritorial assessment."

countenance such tax result and to render a provision of the Michigan sales tax act unconstitutional under the guise of discriminatory taxation. Yet, as a matter of fact, appellant's sole attempt is to avoid a local sales tax and thereby gain preference for interstate commerce (if we are to assume that interstate commerce is involved at all).

It is believed the basic error in appellant's contentions is illustrated by its relying upon cases such as *Jackson Mining Co.* v. *Auditor General*, 32 Mich 488, and, at the same time, ignoring the cases of *Gregg Dyeing Co.* v. *Query*, *supra*, 286 US 472, 473, and *Henneford* v. *Silas Mason Co.*, *supra*, 300 US 577, 583-584.

If, in the *Jackson* case, *supra*, Michigan had imposed a tax of one and one-half per cent per ton on sales of iron ore mined in this state, but had exempted such iron ore consumed in this state, and at the same time had imposed, as a complementary revenue measure, an equivalent use tax on iron ore consumed in Michigan, the case would have been analogous to the case at bar. There would also be a case which would clearly illustrate equality in tax treatment, rather than discrimination.[11]

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[11]

Appellant's error is further manifested by its assumption that since the states referred to on p 13 of its Jurisdictional Statement impose taxes on rental receipts, the Michigan use tax statute is discriminatory. The fact that Ohio might impose a subsequent use tax does not establish discrimination [*Southern Pacific Co. v. Gallagher, supra*, 306 US 167, 172], and the Indiana statute referred to therein is a gross income tax statute and does not involve a use tax.

Arizona, Louisiana, New Mexico, Oklahoma and Mississippi exempt from their use tax statutes [Ariz. Rev. Stat. § 42-1409; La. Rev. Stat. 1950, § 305; N. M. Stat. 1953, § 72-17-4; Okla. Stat. 1951, Title 68, § 1310c, subsection (c); and Miss. Laws 1954, § 10146.04] any tangible personal property or rental receipts from leases of same,

It is believed the general rule applicable here was stated in

> *General American Tank Car Corp.* v. *Day*, 270 US 367, 373,

cited by the Court in *Gregg Dyeing Co.* v. *Query*, *supra*, 286 US 472, as follows:

> "• • • Where the statute imposing a tax which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against non-resident taxpayers,

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when that personal property has been subjected to an equivalent sales tax.

Georgia and Tennessee have statutes [Ga. Stat. § 92-2150.10; and Tenn. Code § 67-3008] which provide the same type of exemption as that contained in the Michigan use tax statute.

It is not clear whether or not the ordinance of the City of New York and the statutes of Ohio and Rhode Island, under which rental receipts are taxed, are complementary revenue measures (i.e., exempting from use taxation, property which has been subjected to the sales tax). On the other hand, the state of Wyoming does not subject to a use tax, automobiles bought and registered in another state and subsequently used in Wyoming. [Opinion of the Attorney General of Wyoming, Nov. 15, 1951.]

Under its use tax statute, North Carolina treats rental receipts the same as does Wyoming, with the additional requirement that the property must be purchased from a retailer doing business both in North Carolina and in the out-of-state place of sale. [Opinions of the Attorney General of North Carolina, Sept. 28, 1946, and March 30, 1949.]

North Dakota has a reciprocity statute similar to that of Michigan, but excludes from its provisions the commercial use of motor vehicles which is purely intrastate. [Rule 116, N. D. Use Tax Stat.; paragraph 59-657 CCH All States Sales Tax Reporter.]

West Virginia and South Carolina do not tax the type of rental transaction such as the one at bar. [W. Va. Code, Chap. 11, Art. 15, § 6, subparagraph 6, and Art 15a, § 3; S. Car. Sales and Use Tax Reg. 11; paragraph 67-511 CCH All States Sales Tax Reporter.]

and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. • • •"

The principles above enunciated were specifically applied to the sales and use tax field in *Henneford* v. *Silas Mason Co., supra,* 300 US 577. This case involved the constitutionality of a Washington use tax statute that exempted property which had been subjected to a sales or use tax of the same amount by another state.

In considering the problem of discrimination, the court stated at p 584:

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. • • • 'There is no demand in . . . [the] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power.' *Gregg Dyeing Co.* v. *Query,* 286 U.S. 472, 480. If the sales tax were abolished, the buyer in Washington would pay at once upon the use. He would have no longer an offsetting credit. While the sales tax is in force, he pays upon the sale, and pays at the same rate. For the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another. This common sense conclusion has ample precedent behind it. • • •"

The principle enunciated in the *Henneford* case *supra*, was reaffirmed in the California use tax case of *Southern Pacific Co.* v. *Gallagher, supra,* 306 US 167, 172.[12]

This Court recently affirmed the general principle here applicable in

> *Allied Stores of Ohio, Inc.*, v. *Stanley J. Bowers, Tax Commissioner of Ohio, supra,* United States Supreme Court, decided February 24, 1959 (27 LW 4110),

in answer to an equal protection argument [which is the only federal question the appellant, as a Michigan retailer, could possibly raise]. This Court there stated:

> "• • • It [the State] is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Cases cited]
>
> 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th Amendment was intended to assure.' [Case cited]
>
> • • •

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[12] The general operative effect of the California sales and use tax statutes is akin to that of the state of Michigan. See statement of the same in Southern Pacific Co. v. Gallagher, supra, 306 US 167, 171.

"• • • Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. [Cases cited]" (27 LW 4110, 4111-4112)

The appellant here attempts to abort the good faith and effort on the part of the state of Michigan to require property, sold or used in this state (unless otherwise exempted), to respond to either its sales or use tax levy. The Michigan sales and use tax statutes are neither constructed nor intended to discriminate against interstate commerce. This is the plain, operative effect of the statutory language employed and is in accord with the express findings of the Court below.